

STATE OF NORTH DAKOTA
GAME AND FISH DEPARTMENT

IN THE MATTER OF:)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
Dean Arlan Jorgensen)	AND DECISION
)	
)	OAH File No. 20040287

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STATEMENT OF THE CASE AND PROCEEDINGS

These proceedings arise upon the request of Dean Arlan Jorgensen (“Jorgensen”) for a hearing pursuant to N.D.C.C. § 20.1-13.1-08 to review the intention of the director of the North Dakota Game and Fish Department (“Department”) to prohibit Jorgensen from operating a motorboat or vessel pursuant to N.D.C.C. ch. 20.1-13.1, for operating a motorboat or vessel (“boat”) while intoxicated, in violation of N.D.C.C. § 20.1-13-07 (2).

Jorgensen was arrested on July 17, 2004, for operating a boat in violation of N.D.C.C. § 20.1-13-07, and in accordance with the provisions of N.D.C.C. ch. 20.1-13.1 was given a chemical test, *i.e.*, a test to determine the alcohol content of his blood (“blood test”). Following the blood test, Jorgensen was served, by certified mail, with a written Report and Notice of intent to prohibit him from operating a boat upon the results of chemical testing, under N.D.C.C. ch. 20.1-13.1. Jorgensen was also personally served a second time with the Report and Notice.

On July 22, 2004, Jorgensen, by his counsel, Mr. Chad McCabe, Bismarck, requested a hearing to review the facts and law constituting cause for prohibiting him from operating a boat under N.D.C.C. ch. 20.1-13.1.

Pursuant to the request of the Department, the undersigned administrative law judge was designated by the Office of Administrative Hearings to preside as hearing officer, *i.e.*, to

schedule and conduct the hearing and issue a decision. A prehearing conference was held on August 19, 2004. As a result of the prehearing conference, a hearing was scheduled by agreement of the parties to be held September 7, 2004, and a notice of hearing and specification of issue was duly served. The hearing was held as scheduled and completed on September 7. Following the close of the evidentiary portion of the hearing, counsel gave oral closing argument. By agreement of the parties the decision of the hearing officer is to be issued not later than 10 days following the close of the hearing, *i.e.*, no later than September 17, 2004.

In accordance with the provisions of N.D.C.C. § 20.1-13.1-08(2), the issues specified for consideration and determination at the hearing are (1) whether the arresting warden or officer had probable cause to believe Jorgensen had been operating a motorboat or vessel in violation of section 20.1-13-07; (2) whether Jorgensen was placed under arrest; (3) whether Jorgensen was tested in accordance with section 20.1-13.1 or 20.1-13.1-04 and, if applicable, section 20.1-13.1-03; and (4) whether the chemical test results show Jorgensen had an alcohol, or other drug, or a combination thereof concentration of at least ten one-hundredths of one percent by weight. At the prehearing conference and at the hearing Jorgensen also raised other issues.

On August 30, 2004, Jorgensen filed a Notice and Motion to Dismiss and/or Suppress Chemical Test Results. At the hearing, on September 7, 2004, the Department filed an Answer Brief. Counsel for the parties further argued the motion at the hearing. In the motion, Jorgensen raises the issues of lack of probable cause and failure to consent to the chemical test. The motion is **denied**. At the hearing, Jorgensen also raised the issue of right to counsel.

Having considered the evidence of the testimony of the three witnesses, Warden Brent Schwan, Michelle Howell, and Jorgensen, and the seven exhibits offered on behalf of the parties and received (*see* attached exhibit list), together with the briefs of the parties and the arguments of counsel, the undersigned concludes that the greater weight of the evidence shows that Warden

Schwan, the arresting warden, had probable cause to believe that Jorgensen had been operating a boat in violation of N.D.C.C. § 20.1-13-07, that Jorgensen was placed under arrest; that Jorgensen was tested in accordance with N.D.C.C. ch. 20.1-13.1; and that the chemical test results show Jorgensen had an alcohol concentration of at least ten one-hundredths of one percent by weight. Further, the evidence shows that Jorgensen consented to the chemical test and was not denied an opportunity to consult with his attorney. Accordingly, the hearing officer makes the following findings of fact, conclusions of law, and decision.

FINDINGS OF FACT

1. On the afternoon and evening of July 17, 2004, Jorgensen and a friend, Ms. Michelle Howell (“Howell”) were boating on the Missouri River. They likely boated, putting in at sand bars occasionally, for at least five hours, and possibly more, as much as nine hours. Around 9:30 p.m. they prepared to dock the boat at the Fox Island boat ramp near Bismarck, North Dakota. The Fox Island boat ramp also has a courtesy dock nearby available for boaters. A courtesy dock is located close to a boat ramp to allow a boat operator to let someone off to retrieve a vehicle or to pick up and let off passengers. Sunset on July 17, 2004, was at 9:32 p.m.

2. Warden Brent Schwan and another warden were patrolling the Fox Island boat ramp area on July 17. At about 9:32 p.m. Warden Schwan noticed a 17-18 foot runabout type boat operating out in front of the boat ramp and courtesy dock area. He saw the operator of the boat, Jorgensen, with the motor “trimmed up,” and he was “porpoising” the boat. At the hearing, Schwan explained that the boat motor power trim was adjusted up as to angle so that the engine was more out of the water, the effect being that the front end of the boat will go up more when given throttle if the engine is trimmed up more as opposed to down. He further explained that

Jorgensen, for about 15 minutes, was out in front of the boat ramp and the courtesy dock porpoising the boat, *i.e.*, alternating giving the boat more throttle with the engine trimmed and releasing the throttle so that boat would rise up out of the water and fall back into the water. For the approximately 15 minutes that Jorgensen was operating a boat in this manner, on and off, several times, the area of the river around the boat ramp and courtesy dock was very busy with other motor boats or vessels.

3. N.D.C.C. § 20.1-13-07(1) prohibits a person from operating “any motorboat or vessel ... in a reckless or negligent manner so as to endanger the life, limb, or property of any person. Reckless or negligent operation ... includes ... any other manner that is not reasonable or prudent.” *See* N.D. Admin. Code § 30-05-01-04.

4. Warden Schwan testified at the hearing, that at the time he witnessed it, he believed Jorgensen’s operation of his boat by porpoising his boat for a relatively long period of time in a heavily congested area with his engine trimmed up was a reckless or negligent operation that was not reasonable or prudent.

5. This Jorgensen boating activity on July 17 was occurring right about sunset and Warden Schwan also noticed that Jorgensen’s boat had no lights on. Jorgensen turned his bow lights on about 10 minutes after Schwan first started observing him, but did not at any time turn on any stern lights.

6. N.D. Admin. Code § 30-05-01-02(6) requires, among other things, that when operating between sunset and sunrise a motorboat under 26 feet in length the boat must exhibit a combination red and green bowlight visible for one mile a certain number of degrees to the left and right of the centerline of the boat, and a white stern light, visible for two miles, placed higher than the bowlight and unobstructed by occupants or portions of the vessel.

7. Warden Schwan did not issue a citation to Jorgensen for violating N.D.C.C. § 20.1-13-07(1), or N.D. Admin. Code §§ 30-05-01-04 or 30-05-01-02(6).

8. At about 9:47 p.m., on July 17, Jorgensen and Howell loaded the boat on a boat trailer. Schwan had a clear, unobstructed view of all the activities involving the Jorgensen boat from the time it began porpoising just off of the boat ramp and courtesy dock until it was loaded.

9. Then, when the boat was loaded, Schwan walked up to the loaded boat and asked to see the boat life jackets. Howell pulled out the life jackets and showed them to Schwan. As Schwan was standing next to the boat waiting to see the life jackets, he saw about a dozen empty, crushed beer cans on the floor of the boat. Then, Schwan assisted Jorgensen out of the boat and asked him to walk over to the parked warden's vehicle. During this first encounter Schwan noticed Jorgensen had slurred speech and "really glassy, watery eyes." As they walked to the warden's vehicle Schwan smelled the odor of an alcoholic beverage on Jorgensen. During that time and while at the warden's vehicle, Schwan talked to Jorgensen for several minutes. During that time, Jorgensen had a blank stare and continued to slur his speech.

10. Then, Schwan asked Jorgensen to take field sobriety tests (FSTs) and began to give him instructions for FSTs. After Schwan had explained the reciting the alphabet test, Jorgensen just looked at him. Schwan explained it three times. After the third time, Jorgensen asked for his wallet, and Howell retrieved Jorgensen's wallet from the boat. At the hearing, Schwan testified that when Howell retrieved Jorgensen's wallet, Schwan talked to her and obtained information from her that further led him to believe that Jorgensen was drinking. However, at the hearing, the specific information he obtained could not be ascertained because Howell could not recall it. Upon receiving his wallet from Howell, Jorgensen looked in it and at about 9:58 p.m. gave Schwan a card. Exhibit 1 is a copy of card that Jorgensen gave Schwan. It is a card with a law firm name and an attorney's name on the front (Mr. McCabe's name) and a

statement on the back. Schwan read the card, told Jorgensen that he was placing him under arrest, and arrested him for operating a boat while intoxicated.

11. Although at the hearing Howell testified that she saw Jorgensen drinking throughout the day on July 17, she could not specifically remember how much, and she could not specifically recall whether Warden Schwan expressed concern to her about Jorgensen having too much to drink or whether she told Schwan that she was concerned about Jorgensen having too much to drink. At the hearing, Howell did remember that on July 17 she told Schwan that she had very little to drink that day.

12. After Warden Schwan arrested Jorgensen, Howell began to talk to Jorgensen, advising him to take the FSTs so that they could go home if he passed them.

13. Jorgensen asked for the card back and Schwan gave it back to him. Jorgensen said he wanted to talk to an attorney. Jorgensen then tried to contact his attorney with his cell phone. Schwan stepped back so that Jorgensen could speak in private and did not hear anything in regard to Jorgensen's attempt to call his attorney. After his attempt to contact his attorney, Jorgensen then talked to Howell some more.

14. After talking further to Howell, Jorgensen told Warden Schwan that he wanted to take the FSTs. After giving instructions and receiving Jorgensen's acknowledgment that he understood, Schwan gave Jorgensen the reciting the alphabet test which Schwan said he failed because Jorgensen went very slowly, stopped a few times, and repeated several letters. Schwan then gave Jorgensen the counting backwards test from 89-65, again after giving him instructions and receiving an acknowledgment that he understood, which Schwan said Jorgensen failed because he stopped at 70 for several seconds and then stopped again at 60, and then counted 60 to 59 and stopped. Warden Schwan then gave Jorgensen instructions for a finger dexterity test (touching thumb to finger and counting) but did not give the test to Jorgensen

because Jorgensen insisted he did not understand the test, even after Schwan explained it several times.

15. After giving or trying to give Jorgensen the FSTs, Warden Schwan asked Jorgensen to take the preliminary breath screening test. Jorgensen did not speak but handed Schwan the card again (exhibit 1). Schwan again placed Jorgensen under arrest for operating a boat while intoxicated.

16. After again placing Jorgensen under arrest, Warden Schwan handcuffed Jorgensen and placed him in the warden's vehicle. Schwan fastened Jorgensen's seatbelt and the wardens transported him to the MedCenter One emergency room in Bismarck for a blood test. While Jorgensen was being transported Schwan read Jorgensen, word for word, the implied consent advisory on the back of the Report and Notice form. Exhibit 8. While Jorgensen was in the vehicle on the way to MedCenter One, his phone rang but he did not answer it. He could not answer because he was handcuffed and no one answered it for him.

17. When they arrived at MedCenter One, Schwan told Jorgensen that they were requesting a blood test from him. Jorgensen said that he wanted to talk to an attorney. Schwan told Jorgensen that he had already tried to call his attorney, and again asked him if he wanted to take the blood test. At the hearing, Schwan testified that although he did not recall whether Jorgensen told Schwan after the first time Jorgensen called that he did not reach his attorney, Schwan assumed that Jorgensen had failed to reach his attorney because he asked again to be allowed to call his attorney. It was then about 10:35 p.m. After being asked a second time to take the blood test, Jorgensen again said that he wanted to talk to his attorney. Schwan told him it was time to take the test. Schwan also told Jorgensen that the card said that he would take all tests required by law to avoid revocation of license, and reminded Jorgensen about the implied

consent law. Jorgensen then consented to take the blood test. At the hearing Jorgensen said that he relied on Warden Schwan's statements in deciding to give his consent.

18. The blood test was appropriately administered by a nurse at about 10:49 p.m. Standard procedures were followed in regard to its administration of the blood test and its submission for testing. *See* exhibit 3. The results were obtained later. Exhibit 4, revised analytical report. The results show an alcohol concentration of 0.18% by weight.

19. Warden Schwan served the Report and Notice on Jorgensen by certified mail on August 4, 2004. Exhibit 7. However, because he had written in the result (0.18) on the form after receiving the results of the blood test, but had signed the form on July 18, the day after the test was given, he was instructed to serve Jorgensen again. Schwan filled out another form on July 29 (exhibit 5). The second form was personally served on Jorgensen by another person on August 12, 2004. Affidavit of Personal Service, exhibit 6

20. Jorgensen has not previously been prohibited from operating a motorboat or vessel for a violation of N.D.C.C. ch. 20.1-13.1 or for a violation of N.D.C.C. § 20.1-13-07.

CONCLUSIONS OF LAW

1. This was, at least initially, an investigatory stop of Jorgensen and his boat on July 17, 2004. To stop Jorgensen and his boat, the law enforcement officer must have a reasonable and articulable suspicion that the boater has violated or is violating the law. The validity of the stop is viewed using an objective test and looking at the totality of the circumstances. *State v. Higgins* 2004 ND 115 (June 3, 2004).

2. Warden Schwan's rather lengthy observation from shore, from an unobstructed vantage point, of Jorgensen porpoising his boat for a considerable length of time and his failure to activate his bow lights for about 10 minutes after sunset, and failure to turn on his stern lights,

in view of the related statutory and regulatory prohibitions, provided Schwan with a reasonable and articulable suspicion that Jorgensen was in violation of a statute or rule forbidding operation of a boat in a reckless or negligent manner and a rule requiring certain lighting for a boat between sunset and sunrise.

3. Once Warden Schwan had the boat stopped there was plenty of evidence showing that Jorgensen may have been operating his boat in violation of N.D.C.C. § 20.1-13-07(2). In the first place, the two reasons for initially stopping the boat, standing alone, were some indication of intoxication; especially Jorgensen's extended porpoising of his boat. Then, as he was talking to Howell and Jorgensen, and viewing the life jackets, Schwan saw about a dozen crushed beer cans in the bottom of the boat. Howell told Schwan that she had not had much to drink that day. Then, Schwan also saw, heard, and smelled Jorgensen with his slurred speech and blurred, watery eyes, the odor of alcohol, and the blank stare. Schwan especially noticed the blank stare and the blurred, watery eyes when he was explaining the FSTs to Jorgensen. All of this occurred before the first arrest. There was more reason for probable cause after the first arrest and before the second arrest, including Jorgensen's failure of the FSTs. Even before the first arrest, however, Schwan observed clear signs of Jorgensen's physical and mental impairment, and had clear reason to believe that Jorgensen's impairment was caused by alcohol. *Moran v. N.D. Dept. of Transp.* 543 N.W. 2d 767 (N.D. 1996).

4. The greater weight of the evidence shows that Schwan had probable cause to believe that Jorgensen had been operating his boat in violation of N.D.C.C. § 20.1-13-07.

5. The greater weight of the evidence shows that Jorgensen was placed under arrest. He was actually placed under arrest two times.

6. The greater weight of the evidence shows that the Jorgensen was tested in accordance with N.D.C.C. sections 20.1-13.1-01 and 20.1-13.1-03. There was no controversy in this regard at the hearing. The tests were conducted in an appropriate fashion.

7. The greater weight of the evidence shows that the chemical test results for Jorgensen show he had an alcohol concentration of at least ten one-hundredths of one percent by weight. The test results showed for Jorgensen an alcohol concentration of 0.18% by weight.

8 “Any person who operates a motorboat ...is deemed to have given consent ... to a chemical test ... of the blood ... for the purpose of determining the alcoholic ... content of the blood.” N.D.C.C. § 20.1-13.1-01. This consent, however, may be withdrawn, and Jorgensen asserts that he did withdraw his consent by providing Warden Schwan with a card, exhibit 1. The facts show that Warden Schwan read the implied consent statute to Jorgensen and Jorgensen eventually gave consent to the blood test. In the circumstances of this matter, the fact that Jorgensen handed Schwan the card does not equate with Jorgensen saying he was withdrawing his consent. Neither is Schwan’s explanation of what Jorgensen’s card said determinative. Although Schwan’s explanation may have influenced Jorgensen, Jorgensen freely consented to take the test. He consented after hearing the implied consent law read to him by Schwan, and after Schwan’s explanation of what the card meant. At the hearing, Jorgensen testified that he had prior to July 17 read the card; presumably he understood what it meant, or, at least, he should have understood, or he should not have presented it. Regardless, citizens are presumed to know the law. *Bellefeuille v. Bellefeuille*, 636 N.W. 195 (N.D. 2001). Game wardens and other law enforcement officers cannot be held to a standard which requires them to interpret documents given to them and correctly advise suspected law violators in accordance with what the provided document and the law states. Perhaps, Warden Schwan should have said nothing about the card, but for Jorgensen to not take the blood test may have had negative results for him,

too. Moreover, the card Jorgensen gave to Schwan in this case is one apparently designed for use by motor vehicle licensees, making its meaning obscure when produced by the operator of a boat. Also, the card seems confined to FST tests and says nothing specifically about blood tests. It does not state that its holder refuses to take all tests. The handing of the card to Warden Schwan by itself did not withdraw Jorgensen's consent. Neither should the explanation of the card by Warden Schwan be held to be an indication of influencing Jorgensen to not want to withdraw his implied consent to a blood test in this situation. The production of the card, especially in this situation, was meaningless on its own, and, in this situation, Warden Schwan should not be held to have influenced Jorgensen to not withdraw his consent. Jorgensen was an informed, freely consenting adult. The evidence does not show that Jorgensen affirmatively withdrew his implied consent. In fact, he affirmatively consented to the blood test even though he maintains that he was relying on Warden Schwan when he did so. *See State v. Mertz*, 362 N.W. 2d 197,198 (N.D. 1985).

9. Finally, Warden Schwan did not deny Jorgensen his right to consult with his attorney. After his arrest (the first arrest), Jorgensen was given time to contact an attorney. He used his cell phone out of the presence of Warden Schwan to do so. He obviously did not reach his attorney. This occurred at about 10:00 p.m. It is unlikely that Jorgensen would have reached his attorney at that time of night, especially if he called his office using the card (exhibit 1). Later, after he was asked to take a blood test, Jorgensen again, more than once, asked to talk to an attorney. It was by then much later. Jorgensen was denied an opportunity at this time. The call to Jorgensen on his cell phone while he was being transported is a red herring. It is not known by anyone who that call was from. Under the circumstances, Jorgensen was given a reasonable opportunity to contact or consult with an attorney before deciding to take the chemical test. He was actually given a chance, once, to contact his attorney and he could not

reach the attorney. To deny him an opportunity the second time, under the circumstances, was not unreasonable. *State v. Berger*, 623 N.W. 2d 25 (2001); *Wetzel v. ND Dept. of Trans.* 622 N.W. 2d 180 (2001); *City of Mandan v. Leno* 618 N.W. 2d 161 (2000); *Baillie v. Moore*, 522 N.W. 2d 748 (1994)

D E C I S I O N

The greater weight of the evidence shows that Warden Schwan had probable cause to believe that Jorgensen had been operating a motorboat or vessel, in violation of N.D.C.C. § 20.1-13-07 on July 17, 2004, that Jorgensen was lawfully arrested, that Jorgensen was tested appropriately under N.D.C.C. ch. 20.1-13.1, and that the chemical tests show Jorgensen had an alcohol concentration of at least ten one-hundredths of one percent by weight. Accordingly, Jorgensen is prohibited from operating a motorboat or vessel in this state for a period of ninety-one days, under N.D.C.C. § 20.1-13.1-07(1).

Dated at Bismarck, North Dakota, this 16th day of September, 2004.

State of North Dakota
Game and Fish Department

By: _____
Allen Hoberg, Administrative Law Judge
Office of Administrative Hearings
1707 North 9th Street
Bismarck, North Dakota 58501-1882
Telephone: (701) 328-3260